IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 1131 OF 2004

Madhukar Sitaram Bhoir
(since deceased, through his
legal representatives -
Smt. Yashodabai M. Bhoir & ors. ... Appellants

V/s

Maruti Tagu Bhoir & ors. ... Respondents

Shri R.S. Datar for the appellants.

CORAM: P.V. KAKADE, J.

DATED: 20TH SEPT., 2004.

P.C.:

1. This appeal is filed by the unsuccessful defendant throughout in the lower Courts.

2. I have heard learned counsel for the appellant. Perused the available record.

The plaintiffs filed the suit for partition and recovery of the amount on the ground that the entire suit property was joint family property and, therefore, he was entitled to partition and possession of his share. The defendants came with the defence that the suit

property was already partitioned and respective share holders were holding their shares and, as such, suit deserves to be dismissed.

3. The learned Civil Judge decreed the suit partly deciding the shares of the parties and also issuing consequential directions in respect of the possession of their respective shares. Being aggrieved by the said judgment and order, the defendants preferred appeal being Civil Appeal No. 293 of 2000 before the District Judge, Thane and the learned Addl. District Judge, after adjudicating the appeal on merits, came to the conclusion that the appeal deserves to be dismissed and confirmed the order of the lower Court. Hence the present appeal.

4. In the course of the appeal, the only so called substantial question of law is sought to be raised is to the effect that, both the lower Courts below have committed serious error of ignoring the fact that partitions had already taken place between the parties in the year 1965 and, therefore, the suit seeking partition was not maintainable. However, on critical perusal of the evidence discussed by both the Courts below, I have no hesitation to hold that the defendants

have utterly failed to establish that the partition had taken place of the impugned property in the year 1965. Apparently, there was not a single document placed on record to prove the fact of so called partition in the year 1965. Even the mutation entries relied upon by the defendants show that those are not in consonance with alleged shares of the sharers but the holdings are quite diverse and, therefore, it cannot be said that partitions were effected in the year 1965 and since then the parties are holding their respective shares therein. In the case of **Kondiba Dagadu Kadam v/s Savitribai Sopan Gujar, reported in (1993) 3 SCC 722,** the Apex Court has categorically held that the conditions mentioned in Sec.100 must be strictly fulfilled before a second appeal can be maintained and no Court has the power to add to or enlarge those grounds. The second appeal cannot be decided on merely equitable grounds. The concurrent findings of facts however erroneous cannot be disturbed by the High Court in exercise of the powers under Section 100. In a case wherefrom given set of circumstances two inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. Moreover, the substantial question of law cannot be considered to be even a question of law

because it is purely a question of fact because whether partitions were effected or not in the year 1965 is purely a question of facts adjuducated properly by both the Courts below and, therefore, both findings would brook no interference.

In the result, the appeal deserves to be dismissed in limine with no order as to costs.

Consequently, the civil application also stands dismissed with no order as to costs.

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